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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Part 1 of the)
Commission's Rules —)
Competitive Bidding Proceeding)

WT Docket No. 97-82

To: Acting Chief, Wireless
Telecommunications Bureau

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SUMMARY

Cook Inlet Region, Inc., Cook Inlet Western Wireless PV/SS PCS, L.P., Western Wireless Corporation, AirGate Wireless, L.L.C., Aerial Communications, Inc., TeleCorp, Inc., and Airadigm Communications, Inc. (collectively "Joint Commenters") urge the Commission to enforce the competitive bidding payment obligations that all broadband personal communications service ("PCS") C block auction participants willingly undertook prior to bidding.

Throughout the development of its competitive bidding rules and during the implementation of the C block auction itself, the Commission made its auction payment requirements quite clear to bidders and nonbidders alike. Principal among these requirements is that a C block license "shall be conditioned on the full and timely performance of the licensee's payment obligations under the installment payment plan." In rules, orders, and public pronouncements, the Commission and its Bureaus confirmed that it would strictly enforce this and other competitive bidding payment rules to safeguard the integrity of the auction process. It is now time for the Commission to do just that.

If the Commission were to signal that spectrum auction bids are negotiable, the Commission effectively would permit bidders to shift responsibility for their business choices to the government. In other contexts, however, the Commission has affirmatively held parties to the financial obligations they willingly undertook, explaining that the Commission was not responsible for private financing matters. In reliance on that

clear precedent, many bidders in the broadband PCS C block auction stopped bidding in certain markets or in the auction altogether when their business plans would not support the Commission's strict payment obligations. The Commission should reinforce the judgment of these parties, not the speculation of those who became overextended.

In that regard, the Commission's action in this matter will substantially impact the integrity of all future auction events. If the Commission signals that its competitive bidding payment obligations are negotiable for C block licensees, it will encourage future speculators to bid first and finance later. Mindful of the broadband PCS precedent, some bidders will always count on downstream relief from the agency that is pledged to ensure the continued provision of service to the public. The Commission should decline to start down that road.

Indeed, that is the course taken by the Commission when faced with requests for installment payment relief from Interactive Video and Data Service ("IVDS") licensees in 1995. Complaining that financing problems made it difficult to fund their installment payments, a number of IVDS licensees asked the Commission to permit installment payments to be made annually instead of quarterly. The Commission, however, denied the request. Noting that its payment terms were commercially reasonable, the Commission made clear that a licensee in financial distress could seek grace period relief under the

Commission's rules. Otherwise, the Commission's payment requirements would not be altered.

Against that background, the Commission would be hard-pressed to establish a predictable waiver policy for the instant matter. It is well-established that waiver of the Commission's rules will not be upheld unless the Commission articulates a standard by which to determine the applicability of the waiver policy. In this instance, some broadband PCS C block bidders complain that financing problems make it difficult to fund their installment payments, in light of which they should not be held to their installment payment terms. Having denied the same relief for IVDS licensees, however, granting a waiver in this case would yield a policy that is haphazard at best.

In the end, the Commission should not hesitate to cancel and reauction defaulted broadband PCS C block licenses. The Commission's rules establish that defaulting licensees are responsible for the difference between their bid and a bid at reauction, plus a penalty, and the Commission might realize even greater present value when reauction proceeds are added to the 10 percent downpayments previously collected from the defaulting C block licensees. The Commission has already rejected the argument that defaulting licensees should be permitted to retain licenses to avoid service delays, and the Commission lacks the statutory authority simply to write down the amount of the defaulters' winning bids. At bottom, only enforcement of the Commission's rules will serve the public interest.

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COMMENTS

Cook Inlet Region, Inc. ("CIRI"), Cook Inlet Western Wireless PV/SS PCS, L.P. ("Cook Inlet PCS"), Western Wireless Corporation ("Western Wireless"), AirGate Wireless, L.L.C. ("AirGate Wireless"), Aerial Communications, Inc. ("Aerial"), TeleCorp, Inc. ("TeleCorp"), and Airadigm Communications, Inc. ("Airadigm") (collectively "Joint Commenters") submit these Comments in response to the Public Notice, DA 97-679, issued by the Wireless Telecommunications Bureau on June 2, 1997.

I. INTRODUCTION

CIRI is an Alaska Native corporation owned by approximately 7,000 Athabascan, Eskimo, Aleut, Haida, Tlingit, and other Native American shareholders.¹ Through Cook Inlet PCS, CIRI bid for and won broadband personal communications services ("PCS") licenses in the Commission's broadband PCS C block auction, C block reauction, and F block auction. Western Wireless is an

¹ A majority of CIRI's shareholders are women. One-third of CIRI's shareholders have incomes below the poverty level. CIRI was created and organized pursuant to congressional enactment as part of the United States' political settlement of Alaska Native claims for the return of their aboriginal lands. See 43 U.S.C. §§ 1601-29e.

established, rapidly expanding wireless service provider with a combined cellular and PCS footprint that covers the vast majority of the geographic areas and population in the western United States.² AirGate Wireless holds broadband PCS F block licenses for four basic trading areas ("BTAs") in North and South Carolina. An affiliate of AirGate Wireless, AirLink, participated in and ultimately withdrew from the broadband PCS C block auction. Aerial is a majority-owned subsidiary of Telephone and Data Systems, Inc., and holds broadband PCS A and B block licenses for six markets. TeleCorp participated in and ultimately withdrew from the broadband PCS C block auction. An affiliate of TeleCorp, TeleCorp Holding Corp., Inc., holds broadband PCS F block licenses for eight markets. Finally, Airadigm holds broadband PCS C block licenses for most of the state of Wisconsin and eastern Iowa, where it is already providing service in several markets.

Cook Inlet PCS, AirGate Wireless, TeleCorp, and Airadigm are eligible to pay for their broadband PCS licenses through the Commission's C and F block installment payment programs. Each of these parties has made its installment payments due to date in a timely fashion, and none is delinquent or in default on any competitive bidding payment obligations. The Joint Commenters

² Western Wireless subsidiaries hold seven broadband PCS major trading area ("MTA") licenses; Western Wireless has commenced operations in all seven of those markets. Western Wireless also was the high bidder for broadband PCS D and E block licenses in 100 BTAs. Western Wireless holds a 49.9 percent limited partner interest in Cook Inlet PCS.

urge the Commission to hold other broadband PCS licensees to the same standard.

**II. ONLY ENFORCEMENT OF THE COMMISSION'S COMPETITIVE BIDDING
INSTALLMENT PAYMENT RULES WILL SERVE THE PUBLIC INTEREST**

Throughout the development of the its competitive bidding rules and the implementation of its spectrum auctions, the Commission made quite clear that strict enforcement of its bid and default payment requirements is critical to ensuring the integrity of the competitive bidding process. In rules, orders, and public pronouncements, bidders were put on notice that they would not be permitted to shift responsibility for their auction-related business choices to the government. Responsible bidders heeded the Commission's warnings, electing either not to bid in excess of specific financing commitments or to withdraw from the bidding altogether when prices outpaced their business plans. Other participants continued to bid, however, and now ask the Commission to rescue them from their choices. Against this background, the Commission will undermine the essential integrity of all future auction events if it suggests that its competitive bidding payment rules are negotiable. In this instance, only strict adherence to the Commission's competitive bidding rules, orders, and public pronouncements will serve the public interest.³

³. Section 24.711(b) of the Commission's Rules sets forth the terms of the installment payments available to broadband PCS C block bidders. See 47 C.F.R. § 24.711(b). The parties asking the Commission not to enforce those provisions are out of time to petition for reconsideration of the terms thereof. CIRI filed a petition for rulemaking on May 7, 1997, urging the Commission to

A. The Commission Made Its Requirements for C Block Bidders Quite Clear

In its competitive bidding proceedings, the Commission established certain rules for the administration of installment payment obligations. Principal among these is that "[a] license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment payment plan."⁴ The Commission thus established that payment according to the terms of the installment plan granted to the bidder was a fundamental condition of holding the federal radio license. Nevertheless, to ensure some limited flexibility, the Commission provided for the availability of narrow grace period relief when other factors suggest that a delinquent licensee warrants relief and will remain accountable.⁵ In judging a request for such a grace period, the Commission established that it may consider:

conduct a notice and comment rulemaking to address the payment issues implicated in this matter. Having established its competitive bidding rules through notice and comment rulemaking, the Commission should consider changes to its competitive bidding rules only in the same fashion.

⁴. 47 C.F.R. § 1.2110(e)(4) (emphasis added). See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2391 (1994) ("Second Report and Order") ("An eligible designated entity that elects installment payments will have its license conditioned upon the full and timely performance of its payment obligations under the installment plan granted to the licensee"); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5593 (1994) ("Fifth Report and Order") ("Timely payment of all installment payments will be a condition of the license grant").

⁵. See 47 C.F.R. § 1.2110(e)(4)(ii).

among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy.⁶

Thereafter, however, the Commission was clear: "Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to part 1, subpart O."⁷

Against this background, the Commission time and again has recognized that strict enforcement of its payment rules is central to the sound administration of its spectrum auction program. Long before the broadband C block auction was underway, for example, the Commission acknowledged that auction activity and installment payment obligations were closely linked. In rejecting one party's call in 1994 to eliminate interest payments on broadband PCS licenses, the Commission ruled:

Reducing or eliminating interest payments could result in very high bids, which could reduce competition and promote defaults among entrepreneurs. Such an approach could also encourage speculation instead of legitimate applicants who can attract capital.⁸

⁶. Id.

⁷. Id., § 1.2110(e)(4)(iii). See also Second Report and Order, 9 FCC Rcd at 2391.

⁸. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 460 (1994) (emphasis added) ("Fifth MO&O"). As the Commission wrote in a related context in the Second Report and

Thus, the Commission considered whether to reduce or eliminate interest payments in crafting rules for its entrepreneurs' block auctions. The policy implications of doing so were apparent to the Commission even then.

Once its broadband PCS auctions were underway, the Commission was no less clear. In a widely-reported speech to a wireless industry association during the broadband PCS C block auction, for instance, Chairman Hundt said:

I am also concerned about the level of bidding in the C block auction. I'm indifferent to the prices: people are bidding of their own free will. But I have heard that some bidders believe that the FCC will forgive the down payment due when the auction is over, and even may forgive the principle payments which begin six years later. In the event that anyone knows anyone who thinks such thoughts, I have some advice you can pass on to them: Forget about it. And what if there are defaults? We have long had plans to re-auction defaulted licenses right away.⁹

Order:

[I]t is critically important to the success of our system of competitive bidding that potential bidders understand that there will be a substantial penalty assessed if they withdraw a high bid, are found not be qualified to hold licenses or default on a balance due. We therefore are adopting penalties to be assessed in the event of default or disqualification. These penalties will provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction.

Second Report and Order, 9 FCC Rcd at 2382 (footnote omitted) (emphasis added).

⁹. Reed E. Hundt, To Loop or Not To Loop: Is That the Question?, Speech to the Cellular Telecommunications Industry Association 3 (Mar. 26, 1996) (emphasis added).

Immediately in the wake of the C block auction, then-Wireless Bureau Chief Michele C. Farquhar issued a statement announcing that the Wireless Bureau had denied the request of BDPCS, Inc., for waiver of the auction payment rules, adding:

Auctions are a market oriented process and defaults are a reality in the marketplace. We offer no guarantee of success, only the opportunity to compete. We are prepared to deal quickly and fairly with defaults and put licenses in the hands of the companies that will provide service to the American public.¹⁰

Indeed, when the Commission denied BDPCS's appeal earlier this year, it wrote:

We have stated previously that in order to maintain the integrity of the auction process, and to ensure the efficient provision of services to the public, auction participants are held to certain obligations, such as meeting relevant financial deadlines.¹¹

Soon thereafter, on February 19, 1997, Chairman Hundt confirmed in a meeting with telecommunications financial analysts and bankers that the Commission would not leave licenses in the hands of defaulters and would reauction defaulted licenses quickly.¹²

¹⁰ News Release: Statement of Michele C. Farquhar, Chief, Wireless Telecommunications Bureau (May 17, 1996).

¹¹ BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, Memorandum Opinion and Order, 12 FCC Rcd 3230, 3235 (1997) (footnote omitted).

¹² See Credit Suisse First Boston, Equity Research Americas Report: A Meeting With "The Commish" 1 (Feb. 24, 1997). Compare id. at 1 ("There will be no breaks for defaulters . . . winners should have discounted the additional funds required for build out into their bids, and if they did not do it, then that's too bad") with Letter from Thomas Gutierrez, Esq., et al. to Michele C. Farquhar, Chief, Wireless Telecommunications Bureau 3 (Mar. 13, 1997) ("greater immediate capital allocation toward auction payments necessarily diminishes the resources available for infrastructure development") ("Gutierrez Letter").

Last month, in response to the suggestion of NextWave Telecom, Inc., that the Commission should authorize a deferral of interest payments for small businesses, the Commission explained:

[O]ur current rules already permit qualifying participants in the installment payment program to pay their installment payment within 90 days after its due date without any type of penalty. We also allow licensees to seek a three- to six-month grace period during which no installment payments need to be made. We believe these procedures give adequate latitude to businesses that require extra time to meet their obligations to the Commission and the government.¹³

More recently, the Wireless Bureau denied BDPCS's petition for reconsideration of its C block auction default penalty, declaring that "[t]he Commission's rules are intended to prevent bidders from bidding when not securely financed."¹⁴ And, just four days ago, the Commission denied another appeal of an auction payment default ruling on the grounds "that the integrity of the auction

¹³. Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Report, FCC 97-164, ¶ 151 (rel. May 8, 1997) (footnote omitted) (emphasis added) ("Market Entry Barriers Report").

¹⁴. BDPCS, Inc., Order, DA 97-1066, ¶ 12 (Wir. Tel. Bur. May 21, 1997) (footnote omitted). In April the Wireless Bureau denied the request for waiver of the C block downpayment rules filed by Carolina PCS I Limited Partnership, explaining that:

to ensure that small businesses have opportunities to participate in the provision of spectrum-based services, and that such services are rapidly deployed, we must require that winning bidders are able to meet their payment obligations in a timely manner. The integrity of the auction process depends on this.

Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, Order, DA 97-890, ¶ 8 (Wir. Tel. Bur. Apr. 28, 1997) (emphasis added) ("Carolina PCS Order").

process is dependent on winning bidders timely satisfying their payment obligations."¹⁵

Time and again, the Commission has made clear that it would strictly enforce its competitive bidding payment rules. These rules were designed to force "bidders to make certain of their qualifications and financial capabilities before the auction"¹⁶ precisely to avoid the situation now at hand. These same rules were known to all auction applicants in advance of the C block auction, as were the Commission's ownership qualifications and the operational headstart of cellular and broadband PCS A and B block licensees. In light of the Commission's rules, orders, and public pronouncements, no C block licensee reasonably can say that it did not know what the requirements for winning and retaining licenses were.

B. The Commission Should Not Permit Bidders to Shift Responsibility for Their Actions to the Government

Against this background, the Commission should not permit broadband C block bidders to shift responsibility for their actions to the government. Throughout the Commission's auctions of broadband PCS and Interactive Video and Data Service ("IVDS") licenses, the Commission routinely has enforced its payment rules

¹⁵. National Telecom PCS, Inc., Memorandum Opinion and Order, FCC 97-192, ¶ 14 (rel. June 19, 1997) (footnote omitted) (emphasis added). Ironically, the day before, Chairman Hundt remarked that the Commission "should offer to restructure the debt of licensees who still owe the government money" Reed E. Hundt, Spectrum Policy and Auctions: What's Right, What's Left, Remarks to Citizens for a Sound Economy 5 (June 18, 1997).

¹⁶. Second Report and Order, 9 FCC Rcd at 2382.

and held parties responsible for their business decisions. In each of those cases, the Commission determined that the soundness of the auction process demanded strict adherence to the choices made by rational bidders.

In late 1994, for example, a number of winning bidders in the Commission's auction of IVDS licenses asked the Commission to permit them to delay the submission of their initial post-auction downpayments, arguing variously that financial difficulties or the general scarcity of IVDS equipment justified a revision of the Commission's payment requirements.¹⁷ In response, the Common Carrier Bureau was unequivocal:

The status of IVDS equipment availability, however, is a matter which we believe prudent businesspersons would investigate prior to committing thousands or millions of dollars for an IVDS license. The availability of equipment, its cost, and its capabilities are matters which have an important bearing on whether a how much to bid for an IVDS license. Bidders who won IVDS licenses without fully understanding these matters should not be able to shift responsibility for their actions onto the government. Grant of a waiver would do so by allowing them to avoid the financial obligations they willingly undertook when they applied to participate in the auction. The exercise of due diligence prior to participating in an auction is very much in the public interest and we wish to do nothing that would discourage such conduct.¹⁸

The Commission should take this opportunity to influence future bidders to exercise "due diligence prior to participating in an auction."

^{17.} See Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, Order, 9 FCC Rcd 6384 (Com. Car. Bur. 1994) ("IVDS Order").

^{18.} Id. at 6385 (emphasis added).

That is precisely the course the Commission has followed in the case of IVDS licensees. The Common Carrier Bureau wrote in 1994:

The Commission also cannot be responsible for the private business arrangements that an applicant has made to finance its successful bid. If an applicant is unsure of its financing, it seems that the more appropriate course would be to not bid or to not bid in excess of the commitments of which it was reasonably certain.¹⁹

The Commission added in 1995:

Bidders must conduct their own due diligence prior to the auction and base their bids on their own license valuations. The Commission has imposed bid withdrawal and default remedies to deter insincere bidding, but the Commission cannot prevent bidders from making uneconomic bidding decisions.²⁰

And, the Wireless Bureau made clear in 1996:

[P]etitioners sought and chose the source of their funds to meet their financial obligations in regard to the award of their IVDS licenses. . . . Choosing the source(s) for financing a business enterprise is an individual business judgment for which each applicant is responsible.²¹

In these cases, the licensees were held to account for their business decisions and bidding choices; the Commission even refused to modify their installment payment schedules when IVDS

^{19.} Id. (emphasis added).

^{20.} Interactive Video and Data Service Licenses, Order, 11 FCC Rcd 1282, 1284 (1995) (footnotes omitted) (emphasis added) ("IVDS Payment Order"), remanded in part on other grounds, Graceba Total Communications, Inc. v FCC, No. 95-1599, slip op. (D.C. Cir. June 20, 1997).

^{21.} Interactive Video and Data Service Licenses - Requests to Extend Payment Deadline, Memorandum Opinion and Order, 11 FCC Rcd 5240, 5242 (Wir. Tel. Bur. 1996) (emphasis added) ("IVDS MO&O").

licensees claimed to have trouble raising capital.²² In the end, the Commission concluded — and rightly so — that "[n]o bidder was forced to bid at the auction, and the government cannot guarantee the financial success of widely differing business plans or prospects."²³

There is no reason for the Commission to reach a different result in this instance. Just as was the case for IVDS bidders, broadband PCS C block bidders should not be able to place the burdens of their choices on to the Commission. Yet, agreeing not to adhere to the Commission's installment payment rules in this instance "would do so by allowing them to avoid the financial obligations they willingly undertook when they applied to participate in the auction." The operational headstart of cellular and broadband PCS A and B block licensees, the details of the Commission's C block ownership rules, and the prospects for post-auction financing are matters that a prudent businessperson would investigate prior to committing millions (or billions) of dollars for broadband PCS licenses.²⁴ Borrowing the

²². IVDS Payment Order, 11 FCC Rcd at 1284-85. See Section III, infra at 18.

²³. IVDS Order, 9 FCC Rcd at 6386.

²⁴. Although some C block licensees suggest that these matters were unknown to them prior to and during the C block auction, see, e.g., Gutierrez Letter at 3; Letter from James H. Barker, Esq., & Michael S. Wroblewski, Esq., to William F. Caton, Acting Secretary, Federal Communications Commission 2 (May 9, 1997) ("Barker Letter"), many prospective bidders commented prior to the C block auction that financing was becoming increasingly scarce. See, e.g., Omnipoint Corp. v. FCC, 78 F.3d 620, 631 (D.C. Cir. 1996); Comments of DCR Communications, Inc., PP Docket 93-253 (submitted July 6, 1995).

Common Carrier Bureau's words, "Bidders who won [C block] licenses without fully understanding these matters should not be able to shift responsibility for their actions onto the government."

C. The Commission Should Validate the Expectations of Responsible Bidders

Rather than guaranteeing the business judgment of C block licensees who cannot pay their obligations, the Commission should validate the reasonable expectations of more responsible bidders.²⁵ In particular, many C block participants stopped bidding in certain C block markets or in the C block auction altogether when they determined that they would not be able to satisfy the Commission's installment payment obligations at the prices then being bid. Parties such as Cook Inlet BellSouth PCS, L.P., AirLink, TeleCorp, GO Communications, and U.S. Airwaves followed the admonition that "the more appropriate course would be to not bid or to not bid in excess of the commitments of which

²⁵. Moreover, the Commission should demonstrate to Congress, the financial community, and the public that it intends to craft rules and develop policies that will be enforced. Congress is working to balance the federal budget and to fund many worthy programs, for which purposes it is relying on the integrity of the Commission's spectrum auction process. The financial community certainly does not favor industries that operate in an uncertain regulatory environment, particularly where the uncertainty is a function of erratic law enforcement. Finally, the public would not support a large giveaway of obligations owed to the government. For the benefit of each of these constituencies, the Commission should demonstrate that its auction rules are predictable, reliable, and fair.

it was reasonably certain."²⁶ Other parties continued to bid, however, and now want the rules to be conformed to their choices.

The Wireless Bureau faced an analogous situation in 1995 when a prospective bidder asked the Commission to waive the deadline for submitting upfront payments required in the broadband PCS A and B block auction.²⁷ The applicant asked to participate in the auction despite having missed the deadline for the upfront payment, to which the Wireless Bureau responded:

[G]ranting such a waiver would be unfair to parties who decided not to participate in the auction because of an inability to secure financing by the November 18, 1994 deadline. Had these potential applicants thought our deadlines were flexible, they may have continued to seek investors beyond the cut-off date. Grant of [this] waiver would harm the public interest by undermining the fairness and integrity of the auction process.²⁸

In that instance, the Wireless Bureau determined that the harm to the public interest in a fair auction process outweighed any benefit to be achieved by relaxing the Commission's rules.

In this instance, a number of C block auction participants decided to restrict their bidding efforts or to stop bidding altogether when the C block auction prices could not be supported by their business plans. Just like the potential applicants in the A and B block auction discussed above, had these potential C block licensees thought the Commission's installment payment

²⁶. IVDS Order, 9 FCC Rcd at 6385.

²⁷. Emergency Petition for Waiver of Deadline for Submission of Upfront Payments for Broadband PCS Auction filed by Personal Communications Corporation, Order, 10 FCC Rcd 2124 (Wir. Tel. Bur. 1995).

²⁸. Id. at 2124 (emphasis added).

rules "were flexible," they may have continued to bid, altering their business plans and financing expectations. They did not do so, however. They followed a more conservative course in reliance on declarations by the Commission there would be no relief from payment obligations. Even more than in 1995, the grant of the payment relief requested now unquestionably "would harm the public interest by undermining the fairness and integrity of the auction process."

D. Failure of the Commission to Enforce Its Rules Will Undermine the Integrity of Future Auction Events

The spectrum auction process mandated by Congress in 1993 is now a vital contributor to the resources of the federal government, and Congress plainly is looking to the Commission to raise revenue and to help achieve a balanced federal budget. Indeed, pursuant to Section 309(j)(12) of the Communications Act, the Commission must report to Congress by September 30, 1997, with, among other things, "a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection."²⁹ To be certain, failure of the Commission to enforce its competitive bidding payment rules now will undermine the integrity of the future auction events about which it must report in September.

In the next twelve to eighteen months, the Commission will likely auction licenses to provide Local Multipoint Distribution Service ("LMDS"), narrowband PCS, various other paging services,

²⁹. 47 U.S.C. § 309(j)(12). In developing its report, the Commission must "conduct a public inquiry" into the matter. Id.

220 MHz service, 800 MHz specialized mobile radio ("SMR"), General Wireless Communications service, Automatic Vehicle Monitoring service, and 37/39 GHz service. In connection with each of these auction events, the Commission will expect applicants, bidders, and licensees to understand and adhere to the Commission's competitive bidding and service rules. If the Commission does not enforce its broadband PCS payment rules now, the precedent materially will affect the conduct and results of those auctions.

As noted above, the Commission strictly enforced its downpayment requirements earlier this year, explaining:

[I]n order to maintain the integrity of the auction process, and to ensure the efficient provision of services to the public, auction participants are held to certain obligations, such as meeting relevant financial deadlines.³⁰

Indeed, the Commission added that, where financing is uncertain, its rules are designed to "encourage bidders to withdraw prior to the close of the auction, thereby resulting in less disruption and damage to the auction process."³¹ More recently, the Wireless Bureau made clear that "we must require that winning bidders are able to meet their payment obligations in a timely manner. The integrity of the auction process depends on this."³²

³⁰. BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, Memorandum Opinion and Order, 12 FCC Rcd 3230, 3235 (1997) (footnote omitted).

³¹. Id. at 3237.

³². Carolina PCS Order at ¶ 8.

If the Commission were to relax its payment rules for certain broadband PCS C block licensees, however, it will plainly signal its willingness to rescue bidders from their business decisions in the future. The Commission already acknowledged that "[r]educing or eliminating interest payments could . . . encourage speculation instead of legitimate applicants who can attract capital."³³ Yet, reducing, eliminating, or deferring interest payments here will be to sanction just such speculation. More importantly, relaxing interest payments today will encourage such speculation in future auctions to the detriment of legitimate applicants who can attract capital. Mindful of the broadband PCS precedent, some bidders will always count on downstream relief from the agency that is pledged to ensure the continued provision of service to the public.

The Joint Commenters recognize that the lack of access to capital frequently limits the ability of smaller businesses to compete with established telecommunications companies.³⁴ The Commission's installment payment plans were designed to help to overcome that limitation. However, the availability of free credit (i.e., financing available without a determination of the debtor's credit-worthiness) fueled speculation in the broadband PCS C block auction by a number of highly sophisticated bidders. Those bidders and their investors placed high risk bets during the C block auction. The role of the Commission now is to

³³. Fifth MO&O, 10 FCC Rcd at 460.

³⁴. Second Report and Order, 9 FCC Rcd at 2389-90.

administer the loans it made to those bidders, not to cover their losing bets.

The Commission has made clear in the past that strict enforcement of its competitive bidding rules is critical to ensuring "the fairness and integrity of the auction process." Were the Commission to grant the relief requested by those C block bidders who cannot satisfy their installment payment obligations, the precedent will be established for future bidders in future auctions. The Commission reported just last month that its payment and grace period rules "give adequate latitude to businesses that require extra time to meet their obligations to the Commission and the government."³⁵ As the Commission prepares to auction licenses for a number of new services, it should not signal anything but strict adherence to that judgment.

III. THE COMMISSION REJECTED THE REQUESTS OF IVDS LICENSEES TO CHANGE THE TERMS OF THEIR INSTALLMENT PAYMENT PLANS

It is important to recognize that this is not the first instance in which the Commission has considered requests to change the terms of its competitive bidding installment payment plans. As noted above, several months after the receiving their IVDS licenses, a number of licensees "requested that the Commission modify the installment payment program to require annual rather than quarterly payments"³⁶ According to the Commission, the licensees argued that "the current state of

³⁵. Market Entry Barriers Report at ¶ 151.

³⁶. IVDS Payment Order, 11 FCC Rcd at 1284.

the IVDS financial and equipment markets makes it difficult to raise capital or earn revenue at this time, and that the requested relief is therefore in the public interest."³⁷

In response, the Commission held the licensees to their payment terms, declaring that:

The repayment schedule established by the Managing Director is consistent with generally accepted lending practices. . . . If petitioners, individually, still require financial assistance . . . under the rules they may request a three-month grace period at any time during the first 90 days following a missed installment payment.³⁸

In that instance, the Commission was firm. Its rules provide for narrow grace period relief for a licensee who finds it "difficult to raise capital or earn revenue" at a given time. Otherwise, the payment schedule established by the Commission was to be followed by all IVDS licensees with installment payment plans.

It is a cornerstone of administrative law that the Commission generally "may not treat like cases differently."³⁹ Courts "have long held that an agency must provide an adequate explanation before it treats similarly situated parties differently,"⁴⁰ the purpose of which is to prevent an agency from "vacillating without reason in its application of a statute or

³⁷. Id. (footnote omitted) (emphasis added).

³⁸. Id. at 1285 (footnote omitted).

³⁹. Freeman Engineering Assoc., Inc. v. FCC, 103 F.3d 169, 178 (D.C. Cir. 1997) (quoting Airmark Corp. v. FAA, 758 F.2d 685, 691 (D.C. Cir. 1985)). See also Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).

⁴⁰. Chadmoore Communications, Inc. v. FCC, 1997 U.S. App. LEXIS 11719, *20 (D.C. Cir. May 20, 1997).

the implementing regulations."⁴¹ As the United States Court of Appeals for the D.C. Circuit ruled long ago, "an agency changing its course must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored"⁴² In this case, the Commission's "policies and standards" are clear.

If the Commission were to decide not to enforce those policies and standards with respect to broadband PCS C block licensees, the Commission would be required to "supply a reasoned analysis indicating" why it "deliberately changed" its installment payment policy in the eighteen months since it denied the same relief to IVDS licensees. The Commission would have to provide a reasoned analysis regarding why its payment rules should not be enforced in this matter, notwithstanding the conclusion just last month that the same rules "give adequate latitude to businesses that require extra time to meet their obligations to the Commission and the government."⁴³ Moreover,

⁴¹. Id. (quoting New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361, 366 (D.C. Cir. 1987)). The Commission even "is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest, if it gives a reasoned explanation for the revisions." DIRECTV, Inc. v. FCC, 110 F.3d 816, 826 (D.C. Cir. 1997) (citation and quotation omitted).

⁴². Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnote omitted), cert. denied, 403 U.S. 923 (1971). Accord Mobile Communications Corp. of America v. FCC, 77 F.3d 1399, 1407 n.2 (D.C. Cir. 1996).

⁴³. Market Entry Barriers Report at ¶ 151. Indeed, just as it did in the IVDS matter, the Wireless Bureau recently issued a Public Notice reminding broadband PCS C block licensees of the availability of grace period relief. Compare Public Notice: